

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHN D. HILL, III</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,275
<b>JACK COOPER TRANSPORT COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the May 19, 2006, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 2, 2006.

**APPEARANCES**

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Stephanie Warmund of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the parties' stipulations include the written stipulation, filed with the Division of Workers Compensation on February 28, 2006, regarding employer's report of accident.

**ISSUES**

This is a claim for a May 28, 2002, accident and alleged injuries to claimant's neck and left shoulder. In the May 19, 2006, Award, Judge Foerschler found claimant sustained a 10 percent impairment to his left upper extremity. Nonetheless, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510e for a six percent whole person functional impairment.

Claimant contends Judge Foerschler erred. Claimant argues he permanently injured both his neck and his left shoulder and, therefore, he should receive permanent disability benefits for a 17 percent impairment to his left upper extremity at the shoulder level combined with a 15 percent whole person impairment due to the cervical spine.

Conversely, respondent and its insurance carrier argue the Award should be affirmed. In the alternative, they argue the award should be decreased to an eight percent permanent disability for a scheduled injury to the shoulder under K.S.A. 44-510d.

The only issue raised on this appeal is the nature and extent of claimant's injury and functional impairment. The parties agree claimant's permanent disability benefits should be based upon his functional impairment rating.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties stipulated claimant injured himself on May 28, 2002, while handling some boxes. Moreover, the parties agreed claimant's accident arose out of and in the course of his employment with respondent.

At the time of the accident, claimant immediately experienced discomfort in his neck, left arm and left shoulder. And claimant promptly notified his supervisors of the incident. But he did not initially seek medical treatment. Consequently, claimant did not receive any medical treatment for this accident until November 2002.<sup>1</sup>

Claimant's symptoms remained relatively static until the temperatures cooled in the fall. From time to time claimant discussed his symptoms with his supervisors. Eventually, respondent referred claimant to Occupational Health Services which provided claimant with medications and an MRI of his cervical spine that showed degenerative disc disease between the fifth and sixth intervertebral levels.

Respondent's insurance carrier referred claimant to Dr. Stanley A. Bowling, who is a board-certified orthopedic surgeon. Dr. Bowling initially treated claimant from January through August 2003. Claimant reported he had neck pain that went down into his left shoulder and shooting pain that went down into his left arm whenever he used his arm or moved his neck. The doctor prescribed aggressive physical therapy, steroid injections and cervical traction. During this first period of treatment the doctor also discussed left

---

<sup>1</sup> R.H. Trans. at 23.

shoulder surgery. But claimant initially elected to forego the left shoulder surgery as he had previously undergone right shoulder surgery, which he felt had provided limited benefit.

After claimant declined left shoulder surgery, in August 2003 Dr. Bowling released claimant from medical treatment with the understanding that claimant could return to the doctor whenever he needed. Claimant was never advised he could no longer return to the doctor for treatment. And claimant's testimony is uncontradicted his supervisors told him there was "no problem at all" returning to the doctor.<sup>2</sup>

At some point in time, which is not disclosed in the record, respondent's insurance carrier approached claimant about settling his workers compensation claim and ending his medical benefits. But claimant declined.

From August 18, 2003, until November 8, 2004, claimant did not receive any medical treatment for his work-related injuries. According to claimant, his neck and shoulder symptoms worsened in the fall of 2004 when the temperatures dropped. After speaking with his supervisor, claimant returned to Dr. Bowling on November 8, 2004, for additional treatment. And on December 14, 2004, claimant underwent left shoulder arthroscopic surgery. During that procedure, the doctor debrided a labral tear.

At his February 2006 regular hearing, claimant testified he continued to have pain in his neck, tightness in his muscles and problems with range of motion. He also testified he had lost both strength and range of motion in his left shoulder.

The record contains the opinions from Dr. Bowling and Dr. Truett L. Swaim regarding claimant's permanent functional impairment. Dr. Bowling first rated claimant in November 2003, before claimant underwent shoulder surgery. Using the *fifth* edition of the *AMA Guides*,<sup>3</sup> Dr. Bowling determined claimant had a 10 percent functional impairment to the left shoulder and a one percent whole person impairment due to the degenerative disc disease in his cervical spine.

More importantly, in February 2005 Dr. Bowling formulated his final impairment rating using the required *fourth* edition of the *Guides*. Because claimant's symptoms had improved and he had full range of motion in the shoulder, the doctor rated claimant's left upper extremity at eight percent. The doctor did not rate claimant's neck as he had full range of motion and he was not describing nerve root symptoms.

---

<sup>2</sup> *Id.* at 32.

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Furthermore, the doctor stated in his February 2005 letter to respondent's insurance carrier that the degenerative disc disease in claimant's cervical spine was a preexisting condition that was *aggravated* by his work-related injury. Nonetheless, after considering a December 2002 MRI that indicated claimant had nerve root compression on the left exiting nerve root between the fifth and sixth cervical vertebrae, Dr. Bowling testified during cross-examination that claimant would have a 15 percent whole person functional impairment under the fourth edition of the *Guides*.

Q. (Mr. Horner) -- what would be your rating on this gentleman in accordance with AMA Guides, Fourth Edition?

A. (Dr. Bowling) With regards to --

Q. If you consider everything that's wrong and the fact that he now has symptoms and didn't have them before.

A. I would go by the original rating of my first one of the 1 percent of whole body with regards to that shows -- I mean, I'd have to look at the book, but I think I would tend to stick with that.

Q. I'll be happy to let you look at mine if you would like.

A. All right. Very good. Give me just a second here. It will take me just a minute. Sorry. Utilizing I guess it would be Table 73, that Cervical Thoracic Spine Impairment Categories, evidence of radiculopathy, evidence that radiculopathy is present, it would be 15 percent of the whole person.<sup>4</sup>

The doctor further testified it takes some three to six months following surgery for scar tissue to fully mature, which can affect the shoulder's range of motion. Consequently, Dr. Bowling rated claimant before it could be known what effect claimant's scar tissue would have on his shoulder and ultimate impairment.

At his attorney's request, claimant was examined in May 2005 by board-certified orthopedic surgeon Dr. Truett L. Swaim. The doctor concluded claimant's May 2002 accident caused the left shoulder labral tear. That accident also strained claimant's cervical spine and aggravated a preexisting degenerative condition in his spine. Using an electronic inclinometer, the doctor determined claimant had decreased range of motion in his left shoulder. Moreover, utilizing the fourth edition of the *AMA Guides*, Dr. Swaim rated claimant's cervical condition as comprising a 12 percent whole person functional impairment and the left shoulder injury as comprising a 17 percent impairment of the left

---

<sup>4</sup> Bowling Depo. at 45-46.

upper extremity, which equals a 10 percent whole person impairment. Using those functional impairment ratings, the doctor utilized the *Guides'* combined values chart and determined claimant had a 21 percent whole person functional impairment due to his May 2002 accident.<sup>5</sup>

Dr. Swaim used the range of motion model to rate claimant's cervical spine. The doctor, however, testified he could have used the DRE (Diagnosis-Related Estimates) model in which he would have rated claimant as having a 15 percent whole person impairment.<sup>6</sup> The doctor was not asked which rating was more accurate or better reflected claimant's functional impairment. Likewise, the doctor was not asked what claimant's combined rating would be if the 15 percent whole person impairment was combined with the 10 percent whole person functional impairment for the shoulder.

The Board finds and concludes claimant has sustained a 21 percent whole person functional impairment due to his May 28, 2002, work-related injury. The greater weight of the evidence establishes that claimant permanently injured both his left shoulder and cervical spine. And it appears Dr. Swaim's 21 percent whole person functional impairment rating is the more reliable as Dr. Bowling rated claimant before it could be ascertained whether claimant's shoulder would be affected by scar tissue.

Claimant argues his neck injury comprises a 15 percent whole person impairment. But this Board is not persuaded as this record indicates radiculopathy is required to attain that rating. And this record fails to establish that claimant has the required radiculopathy.

In conclusion, claimant has sustained a 21 percent whole person impairment and, therefore, he is entitled to receive benefits for a 21 percent permanent partial general disability under K.S.A. 44-510e.

### **AWARD**

**WHEREFORE**, the Board modifies the May 19, 2006, Award and increases claimant's permanent partial general disability from six percent to 21 percent.

John D. Hill, III, is granted compensation from Jack Cooper Transport Company and its insurance carrier for a May 28, 2002, accident and resulting disability. Mr. Hill is entitled to receive 87.15 weeks of permanent partial general disability benefits at \$417 per week,

---

<sup>5</sup> Swaim Depo. at 18.

<sup>6</sup> *Id.* at 18, 19.

or \$36,341.55, for a 21 percent permanent partial general disability, making a total award of \$36,341.55, which is all due and owing less any amounts previously paid.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2006.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant  
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier